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No. 86-310

In The
Supreme Court of the United States
October Term, 1986

ROB WARDEN, CHICAGO LAWYER and SANDRA BIETILA,

Petitioners,

v.

HONORABLE ROBERT A. NOLAN, Judge of the Circuit Court of DuPage County,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

PETITIONERS' REPLY MEMORANDUM

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HONORABLE ROBERT A. NOLAN,
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Respondent.

On Petition For A Writ of Certiorari
To The Supreme Court of Illinois

PETITIONERS' REPLY MEMORANDUM

The subject of this litigation is an order issued by the Respondent, a Judge of the Circuit Court of DuPage County, Illinois. The order was entered on March 3, 1986 and imposed prior restraints of indefinite duration on attorneys and law enforcement personnel and denied the press and the public access to unknown and uniden-

tified material in the court record and to transcripts of certain pretrial proceedings some of which had been open to the public at the time they were held.

Respondent's position is that his restrictions on access to unidentified court records and prior restraints on communications by attorneys and law enforcement are lawful because the First Amendment does not apply at all to judicial records or "access to" such persons. In the same vein, Respondent asserts there is no constitutional right of public access to transcripts of pretrial court proceedings and in the event there is, his vague and conclusory findings provide a constitutionally adequate predicate. Petitioner Bietila apparently presents "no case or controversy" per the Respondent. Lastly, published newspaper accounts of a scheduled hearing of Warden's

Warden's motion to vacate existing restrictions served to provide constitutionally adequate notice of the Respondent's intention to impose new, prospective restraints later proposed by his own counsel. The decisions of this Court and the evidence of record require the rejection of these erroneous positions and the issuance of a Writ of Certiorari.

I. THE FIRST AMENDMENT PROTECTS ACCESS TO TRANSCRIPTS AND COURT RECORDS

A. Access To Transcripts Of Proceedings

Contrary to Respondent's assertions, the transcripts to which Petitioners have been denied access are of proceedings to which the First Amendment right of public access applies. Press Enterprise Co. v. Superior Court, ___ U.S. ___, (June 30, 1986), ("Press-Enterprise II"). In Press-Enterprise II this Court held unconstitu-

tional the denial of access to the transcripts of a closed preliminary hearing. In so doing, the Court reviewed its chain of decisions insuring a constitutional right of access to a number of different types of pretrial proceedings and defined its "tests of experience and logic." Slip Op. at 6-7.

Respondent, without supporting argument, asserts that this Court's affirmance of a First Amendment right of access to preliminary hearings does not apply to "other pretrial proceedings." (Respondent's Brief at 8-9.) Significantly, he fails to supply the information which only he is able to furnish -- the nature and type of proceedings which are in issue.

Petitioners know that at least some of the proceedings were held in public (and know that at least a portion of the January 15, 1986 proceeding was held in camera) and

that a court reporter was present. Petitioners do not know the nature, objectives, outcomes, effects of, or participants in, the proceedings. This quandry, however, serves only to highlight the lack of sufficient findings by the Respondent in not identifying even the nature of the relevant proceedings. In the absence of sufficient findings, we must presume the proceedings in issue meet the tests defined by this Court as establishing a right of access. Press Enterprises II, Slip Op. at 5-10. To do otherwise would allow the ambiguity created by Respondent's vagueness to result in the de facto approval of a procedure barring access to transcripts of public and unknown in camera proceedings prior to trial.

Moreover, as to the Respondent's argument that there was a sufficient

predicate for his restrictions on the transcripts, his conclusory statement that the transcripts sealed "may bear" upon the "identity, testimony and credibility of potential witnesses" falls far short of the burdens imposed on trial courts by Press-Enterprise II. (Order of March 3, 1986, Par. 2 and Par. 3, Petition for Certiorari, App. 18a-19a.)

Without access to transcripts of court proceedings for the period of December 15, 1985 to January 21, 1986, neither Petitioners nor any other member of the public would be able to ascertain what actually occurred in courtroom proceedings preparatory to the retrial in Buckley.[1] In Press Enterprise II, this Court found that

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[1] The subsequent release of some of these transcripts (on or about May 7, 1986) does not moot the issue of all of the transcripts originally being withheld. Press Enterprise II, Slip Op. at 4.

denying transcripts to the public would frustrate the value of "openness" of criminal proceedings. Slip Op. at 11. In Press Enterprise Co. v. Superior Court, 464 U.S. 501, 508 (1984), ("Press Enterprise I"), this Court explained that "the value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the same knowledge that anyone is free to attend gives assurances that established procedures are being followed and that deviations will become known." (Emphasis in original.) The value of openness is not served by sealing transcripts of proceedings which were open when they occurred. Where the public relies on the openness of the proceeding rather than actual attendance, denial of access to transcripts of official court proceedings is

the equivalent of denial to the proceedings themselves.

B. Access To The Unidentified Court Records

Respondent's March 3 Order sealed unidentified documents in the previously-public court file "because they consist of materials which bear upon the identity, testimony and credibility of witnesses and are the subject matter and object of ongoing investigations." (Petition for Certiorari, App. 18a.) Respondent's Brief (at 4-6) simply denies that a First Amendment right is involved, and asserts that public access to public court files is "subject to the inherent powers of the court."

Respondent's principle authority for his assertion that no First Amendment right is involved is United States v. Edwards, 672 F.2d 1289 (7th Cir. 1982). In that case,

however, no constitutional claim of right to access to the tape recordings in issue was made. 672 F.2d at 1292. Moreover, the Seventh Circuit subsequently has explicitly recognized the First Amendment right of access. In Matter of Continental Illinois Securities Litigation, 732 F.2d 1302, 1308 (7th Cir. 1984), that Court held that a First Amendment right of access applies to exhibits to a motion to terminate claims in a shareholders' derivative suit.

Other Circuit Courts of Appeals have reached the same conclusion. In United States v. Smith, 776 F.2d 1104 (3d Cir. 1985), the Third Circuit found a constitutional right of access to bills of particulars in criminal cases, which could only be restricted if the requirements of Press-Enterprise I are followed. 776 F.2d at 1111-12. Similarly, the Ninth Circuit in

Associated Press v. United States District Court, 705 F.2d 1143, 1145 (9th Cir. 1983) found a First Amendment right of access to "pretrial documents in general," reasoning that they can be important to public understanding of the criminal process.

Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978), also relied upon by Respondent, provides no support for his argument. In that case, this Court considered whether the free press guarantee affords media the right to obtain and copy tape recordings, for rebroadcast, that had been introduced in evidence at trial. The tapes had been played in court, and transcripts of them had been provided. "There simply were no restrictions upon press access to, or publication of any information in the public domain . . . . There is no question of a truncated flow of

information to the public." 435 U.S. at 609.

That is very different from this case, where Respondent removed from public court files, without sufficient findings, previously-public documents. Here, there is an impediment to the flow of information to the public. While in Nixon the press and public were under no restrictions in their access to information, Petitioners have been forclosed from even knowing the nature of the document(s).[2] Unlike Nixon, the "value of openness" of the judicial process is contravened by the sealing of formerly accessible documents.

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[2] Respondent has never identified the sealed documents. At a minimum, constitutionally adequate findings required as much. Indeed, even before this Court, Respondent maintains his posture of secrecy, refusing to disclose even the quantity of sealed materials. E.g., "a certain document or documents." (Respondent's Brief at 3.)

II. COMMUNICATIONS BY ATTORNEYS AND LAW ENFORCEMENT PERSONNAL ARE PROTECTED BY THE FIRST AMENDMENT

In defending Par. 4 of the March 3, 1986 order which forbids communications pertaining to People v. Buckley, Respondent has inaccurately characterized Petitioners as asserting a right of access to attorneys and others. This is not the basis for Petitioners' attack on this portion of the order.

As set forth in Par. 5 of Petitioner Warden's affidavit filed in the Supreme Court of Illinois, it is his position that but for Respondent's order, persons subject to the order would provide him with information and documents concerning the case. (Petition for Certiorari, App. 9a.) Petitioners recognize that any attorney or law enforcement official may decline to speak to them. As to persons willing to

communicate with each other, the order stands as an unconstitutional prior restraint. Such an interference with communication between willing speakers and listeners offends the First Amendment. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-757 (1976).

In casting his argument against a "right of access" which Petitioners have not claimed, Respondent has ignored the heavy burden of justification for the prior restraints imposed by his order. The order lacks any finding of a substantial probability of prejudice to Buckley's ability to receive a fair trial. Trial participants and law enforcement agents have been forbidden to speak on broad categories of topics with no showing of any serious and imminent threat to a fair trial. Such

restraints on trial participants who may be willing to speak to Petitioners violate the First Amendment rights of the press by withdrawing significant sources of information. CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975). See also, Levine v. U.S. District Court, 764 F.2d 590, 594 (9th Cir. 1985).

Rule 7-107 of the Supreme Court of Illinois, Ill. Rev. Stat. Ch. 110A Rule 7-107 (1985), from which the prohibitions of the gag order are drawn, provides an adequate legal remedy for any statements which present a serious and imminent threat to the fairness of a trial. In the absence of specific findings tied to an identifiable threat to a fair trial, discipline of persons who actually transgress the rule must be chosen in preference to imposition of broad prior restraints. Southeastern

Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-559 (1975).

III. PETITIONER BIETILA HAS STANDING TO SEEK REVIEW IN THIS COURT AND NOTICE WAS CONSTITUTIONALLY INSUFFICIENT

Petitioner Bietila as a member of the public with a specialized interest in proceedings where capital punishment may be imposed has standing to pursue this Petition.

Respondent attacks Bietila's standing to complain of restraints because she did not appear before Judge Nolan, but only before the Illinois Supreme Court in Warden v. Nolan II.[3] Under Illinois law, the Illinois Supreme Court has original jurisdiction in mandamus actions, and in Motions

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[3] Absent a concession that Respondent would vacate his order upon request from Bietila, such a request, on the record of this case, would be futile.

for a Supervisory Order of the Court. Ill. Rev. Stat. Ch. 110A, Sections 381, 383 (1985). Rock v. Thompson, 85 Ill.2d 410 (1981); People v. Kerner, 32 Ill.2d 539 (1965). It is Bietila's appearance before the state supreme court, and the uncontested factual evidence that she provided there (App. 11a-13a) that gives her standing to seek review in this Court. Moreover, while the Illinois Supreme Court gave no reasons to support its denial of relief to Petitioners, it did not distinguish between Petitioners on grounds of standing.

As a member of the public who has need to communicate with persons barred from providing information as a direct result of Respondent's order, Petitioner Bietila has standing to seek review in this Court. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at

756-757.

Instead of meeting his duty to justify why notice of a hearing on prospective restraints is not a constitutional requirement, Respondent argues that because the scheduling of a hearing on the then-existing gag order happened to be reported in the press, sufficient notice was provided. However, Petitioners complain of the failure to give notice that prospective restraints would be considered.

CONCLUSION

The decisions of this Court required the Respondent to accord First Amendment protection to the transcripts, records and communications in issue in this case. The failure of Respondent and the Illinois Supreme Court to identify and properly resolve these important issues necessitates the granting of the Writ of Certiorari by

this Court.

Respectfully submitted,

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